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NG LEE CHON

v.

KLHW MANAGEMENT SDN BHD & ORS

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HIGH COURT MALAYA, KUALA LUMPUR
MAH WENG KWAI JC
[SUIT NO: D-22NCC-264-2010]
29 JUNE 2011

C ***CONTRACT:*** *Guarantee - Validity - Tenancy agreement renewed and extended - Same terms and conditions remained - No new tenancy agreement executed - Second tenancy expired and not extended - Refusal of tenant to vacate land - Eviction - Claim against guarantors - Whether guarantee valid and binding*

D ***CONTRACT:*** *Tenancy agreement - Rent - Tenants required to quit and deliver vacant possession - Formal notice to deliver vacant possession served - Refusal to vacate - Liability - Mesne profit - Whether notices to quit valid*

E The plaintiff and the first defendant entered into a tenancy agreement in respect of a certain property at a rental of RM40,000 per month. The tenancy agreement was guaranteed by the second and third defendants ('the guarantors') and was for a period of three years with an option to renew after two years. F Upon expiry, the first defendant renewed the tenancy agreement and extended it. The same terms and conditions remained but the rental was increased to RM46,000 per month and no other written agreement was executed. When the second tenancy expired, the plaintiff chose not to extend it further and gave the G first defendant a month to hold over the tenancy. The plaintiff first informed the first defendant to quit and deliver vacant possession of the said land. Next, a formal notice to deliver vacant possession was served on the first defendant, failing which mesne profits of RM92,000 per month would have to be paid by the first H defendant. The first defendant failed/refused to quit the land and this led to the demolishment of the premises. The plaintiff alleged that he was entitled to mesne profit amounting to RM736,000, and subsequently claimed the amount from the first defendant as well as the guarantors. The issues before the court were whether I the two notices to quit and deliver vacant possession were valid and whether the guarantee signed by the second and third defendants remained valid and enforceable against them.

Held (allowing claim against first defendant; disallowing claim against guarantors)

(1) The first notice to quit by the plaintiff was a mere expression of hope that the first defendant would vacate the said land. However, the second notice issued was a formal notice. Considering that at the material time the tenancy was a monthly tenancy, the second notice to the first defendant to deliver vacant possession was sufficient and reasonable. Therefore, the plaintiff's claim against the first defendant for mesne profits was allowed while the first defendant's counterclaim was dismissed. (paras 15-17)

(2) The defence of *non est factum* was an afterthought and cannot be accepted. The solicitor who prepared and witnessed the signing of the guarantee had taken pains to explain the contents of the guarantee to the guarantors, in Chinese. The guarantors did not indicate at any time that they did not understand the contents of the guarantee. (para 19)

(3) The fact that the tenancy agreement was renewed did not mean that the guarantee was extended as well. It was not stated anywhere that the guarantee would be valid in tandem with the tenancy agreement. In addition, correspondences between the guarantors and the plaintiff did not make any reference to the guarantee. And there was also no evidence that the second and third defendants had agreed to the extension of the guarantee. (para 22)

(4) The guarantee had expired upon the expiry of the first tenancy period and there can be no renewal of the guarantee upon the commencement of the monthly tenancy. The defendants cannot therefore be held liable as guarantors in the claim for mesne profits against the first defendant. If the plaintiff had intended to have the guarantee continued for as long as the first defendant was tenant, the plaintiff should have made it expressly known to the second and third defendants, and cause their consent therefor to be obtained. (para 22)

Case(s) referred to:

Emar Sdn Bhd (under Receivership) v. Aidigi Sdn Bhd and another appeal [1992] 1 LNS 33 SC ***(refd)***

Union Workshop (Construction) Co v. Ng Chew Ho Construction Co Sdn Bhd [1977] 1 LNS 149 HC ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 28(4)(a)
Evidence Act 1950, ss. 91, 92

For the plaintiff - Keppy Wong; M/s Keppy Wong & Assocs
For the defendant - SM Chan (HL Khor & LH Teo); M/s Tan Chuan Yong & SM Chan

Reported by Najib Tamby

JUDGMENT

Mah Weng Kwai JC:

Facts Of The Case

[1] On 12 June 2001, a society known as the "Persatuan Chha Yong Fay Choon Kuan, Selangor dan Wilayah Persekutuan", the registered owners of a piece of vacant land, agreed to let the land to the 1st defendant to be used as a food court/hawker centre at the rental of RM40,000 per month. A tenancy agreement for three years commencing from 16 July 2001 till 15 July 2004 with an option to renew for another two years, was entered into between the plaintiff and the 1st defendant (exh. P4).

[2] As the 1st defendant was a RM2 company, the plaintiff insisted that the tenancy be guaranteed by the 2nd and 3rd defendants, the directors of the 1st defendant. The 2nd and 3rd defendants agreed and a guarantee (exh. P3) was executed by them in favour of the plaintiff on 12 June 2001, guaranteeing to pay all rentals due and payable by the 1st defendant.

[3] The 1st defendant exercised its option to renew the tenancy upon its expiry on 15 July 2004 and the Tenancy Agreement was extended from 16 July 2004 to 15 July 2006 upon the same terms and conditions save that the rental was increased to RM46,000 per month (exh. P5). To save costs, the parties agreed not to execute another written tenancy agreement.

[4] Upon the expiry of the second tenancy period, the plaintiff did not agree to extend the tenancy for another fixed term as it had plans to develop the said land. Instead, the plaintiff allowed and the 1st defendant agreed to hold over the tenancy on a month to month basis subject to the same terms and conditions including the rental at RM46,000 per month (exh. P8).

[5] On 18 April 2007, the plaintiff informed the 1st defendant to quit and deliver vacant possession of the said land by 31 July 2007 (exh. D13 T). This was followed by a formal notice issued by the solicitors for the plaintiff dated 7 June 2007 (exh. P7) to quit and to deliver vacant possession by 31 June 2007, failing which the 1st defendant would have to pay mesne profits (double rental) at RM92,000 per month.

[6] The 1st defendant failed and/or refused to quit the said land until its premises were demolished by Dewan Bandaraya Kuala Lumpur for breaches of the building laws and regulations in March 2008.

[7] The plaintiff's claim against the 1st defendant is for mesne profits, under s. 28(4)(a) of the Civil Law Act 1956 for eight months at RM92,000 per month thereby totalling RM736,000 for the period from 1 August 2007 to 31 March 2008.

[8] The plaintiff's claim against the 2nd and 3rd defendants for the said sum is based on the guarantee executed on 12 June 2001. The plaintiff contended that the guarantee was not revoked at any time and as such remained binding on the 2nd and 3rd defendants.

[9] The defendants contended that the two notices to quit were invalid and bad in law. Hence, the 1st defendant's claim for damages for the wrongful termination of the Tenancy Agreement.

[10] The main challenge mounted by the 2nd and 3rd defendants however, was that the guarantee was unenforceable from inception and that it was not binding upon them right up to the time of their eviction.

Decision Of The Court

[11] After hearing the evidence of the witnesses for the plaintiff and defendants and the oral submissions of counsel and upon reading the written submissions, the court held that the plaintiff had on a balance of probabilities, established its case against the 1st defendant for mesne profits but failed to prove its case against the 2nd and 3rd defendants premised on the guarantee of 12 June 2001. The court also held that the 1st defendant had failed to prove its case against the plaintiff in its counterclaim. Accordingly,

A the court entered judgment for the plaintiff in the sum of RM736,000 less two months rental deposit of RM80,000, against the 1st defendant together with interest and costs and dismissed the plaintiff's claim against the 2nd and 3rd defendants with costs. The 1st defendant's counterclaim was also dismissed with costs.

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[12] The plaintiff being dissatisfied with the decision of the court in respect of the 2nd and 3rd defendants only now appeals against the said decision.

C **[13]** There is no appeal by the 1st defendant against the decision dismissing the counterclaim.

Reasons For The Decision

[14] In essence, there were only two issues to be determined by D the court namely:

(i) whether the two notices to quit and deliver vacant possession were valid; and

(ii) whether the guarantee signed by the 2nd and 3rd defendants E remained valid and binding up to March 2008.

Issue 1 – Whether The Two Notices To Quit And Deliver Vacant Possession Were Valid

F **[15]** The first notice to quit was issued by the plaintiff to the 1st defendant on 18 April 2007 (exh. D13). The court held that this was not a proper notice to terminate the tenancy as it was merely an expression of hope by the plaintiff that the 1st defendant would vacate the said land.

G **[16]** However, the same cannot be said of the second notice. This notice was a formal notice issued by the solicitor acting for the plaintiff dated 7 June 2007 to the 1st defendant to quit by 31 July 2007. Considering that at the material time the tenancy was a monthly tenancy, the notice dated 7 June 2007 giving one H and a half months' time to the 1st defendant to deliver vacant possession was sufficient and reasonable notice. This was notwithstanding the 1st defendant's challenge on the notice of termination by its solicitor's letter dated 30 July 2007 (exh. D15).

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[17] With a ruling that the notice to quit dated 7 June 2007 was a valid notice, the court allowed the plaintiff's claim against the 1st defendant for mesne profits from 1 August 2007 till 31 March 2008. Correspondingly, the 1st defendant's counterclaim for damages for wrong termination was dismissed.

Issue 2 – Whether The Guarantee By The 2nd And 3rd Defendants Was Valid And Binding

[18] It will be useful and pertinent to consider the full text of the guarantee which reads:

Re: Tenancy Agreement

In consideration of your having agreed at our request to accept KLHW Management Sdn. Bhd. (hereinafter called "the Tenant") as the tenant of your vacant land held under CT22864 to 22880 for Lots 137 to 153, CT 22896 to 22990 for Lots 171 to 175 and Geran 13106, 13097 & 13102 for Lots 176 to 178 all in Section 65 Kuala Lumpur for three (3) years commencing 16th July, 2001 and expiring on 15th July, 2004 upon the terms of an agreement dated the 12th day of June 2001 at the monthly rent of RM40,000.00 payable by monthly payments in advance, we hereby jointly and severally guarantee the payment by the Tenant to you of the said rent and the performance and observance by it of the terms of the said tenancy agreement upon the following conditions:

1. If the Tenant shall make default in the payment of the rent for the space of seven (7) days we will upon a written request by you pay you the monthly rent which shall be so in arrears.

2. It the Tenant shall make default in the performance or observance of any of the provisions on its part contained in the said tenancy agreement we will pay you all losses damages expenses and costs which you shall be entitled to recover by reason of such default to the extent to which you shall be unable to recover them from the Tenant.

3. This guarantee shall continue for the duration of the tenancy agreement and extend to the acts and defaults of the Tenant during that period but during that period it shall not be revocable or discharged by the death of anyone of us or by the winding up of the Tenant and without prejudice to the foregoing provision of this clause this guarantee shall not be discharged by your giving the Tenant time in which to meet its rent or other indulgence in respect of its obligations under the said tenancy agreement.

Yours faithfully.

sgd	sgd
...	...
Name: Kang Lye Hin	Name: Teng Ah Gaik
Nric No: 570617-07-5067	Nric No: 570603-07-5058
In the presence of:	In the presence of:
sgd	sgd
Wong Chiong Seng	Wong Chiong Seng
Advocate & Solicitor	Advocate & Solicitor
Kuala Lumpur	Kuala Lumpur

[19] The 2nd and 3rd defendants contended that the guarantee signed by them on 12 June 2001 was not binding as it was not explained to them and that they had thought the guarantee was the tenancy agreement. This defence of *non est factum* cannot be accepted by the court as the evidence of Wong Chiong Seng (PW4), the solicitor who prepared the guarantee and who witnessed the signing of the guarantee by the 2nd and 3rd defendants, clearly shows that PW4 had taken pains to explain the contents of the guarantee in Chinese to the 2nd and 3rd defendants before it was signed by them.

[20] PW4 had in fact taken the trouble to go to the office of the 2nd defendant to explain to him the contents of the guarantee. The 2nd and 3rd defendants did not at any time indicate that they did not understand the contents of the guarantee. They had in fact agreed with the plaintiff to sign a guarantee to guarantee the tenancy agreement. There was no allegation of fraud or misrepresentation made against the plaintiff. This plea of *non est factum* is an afterthought and there is no reason whatsoever to doubt the veracity of the evidence of PW4.

[21] The plaintiff contended that the guarantee was a continuing guarantee and that it was "carried forward" upon the expiry of the first tenancy period into the second tenancy period and that there was not revocation of the guarantee at all material times. The fact that the tenancy period was extended from 16 July 2004 to 15 July 2006 at the request of the 2nd defendant cannot be disputed (exh. P5). What is in dispute however, is whether the 2nd and 3rd defendants had similarly extended their guarantee for the period of the second tenancy.

[22] On the facts, the court held that the guarantee was not similarly extended for the following reasons: A

(i) the letter dated 23 April 2004 (exh. P5) from the 2nd defendant requesting for an extension of the tenancy agreement did not make reference to the guarantee; B

(ii) the letter dated 14 June 2004 (exh. P6) from PW4's legal firm to the 1st defendant informing them of the renewal of the tenancy agreement also made no mention of the guarantee;

(iii) it is important to note that the Tenancy Agreement itself does not provide for a guarantee to be executed by the 2nd and 3rd defendants in favour of the plaintiff; C

(iv) importantly, PW4 in his evidence clearly stated that no mention of any guarantee was made in exh. P6 as he had no instructions from his client, the plaintiff, on any guarantee at any time. PW1 had agreed with this in his evidence; D

(v) PW4 agreed that it was not expressly stated in the guarantee that the guarantee shall remain as long as the tenancy continued; E

(vi) it was the plaintiff's position that as the tenancy agreement was renewed for a period of another two years, it would be implied that the guarantee would also be extended for as long as the tenancy continued; F

(vii) it cannot be assumed that just because the tenancy agreement was renewed therefore the guarantee would impliedly be extended as well on the following grounds:

G

(a) to begin with, nowhere was it stated in the guarantee or tenancy agreement that the guarantee would be valid in tandem with the tenancy agreement. In fact PW1 agreed that it was not stated in the tenancy agreement or guarantee that the guarantee would continue as long as the tenancy continued, H

(b) the letter for renewal of the tenancy agreement (exh. P6) made no mention that the guarantee would impliedly be deemed extended as well;

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(c) there is no evidence whatsoever that the 2nd and 3rd defendants had agreed to the extension of the guarantee;

(d) while it may well have been the intention of the plaintiff to have the 2nd and 3rd defendants continue with their guarantee because the 1st defendant remained a RM2 company, that intention was not converted into a requirement that the 2nd and 3rd defendants should continue with their guarantee before the tenancy agreement would be extended. The continuation of the guarantee cannot be deemed to have been automatically extended;

(e) PW1 had agreed in evidence that there was no intention to have the guarantee remain as long as the tenancy continued as this was not stated in the guarantee itself nor in the tenancy agreement;

(f) PW2 confirmed that he did not speak to either the 2nd defendant or 3rd defendant regarding the guarantee; and

(g) PW3 also stated that he did not personally at any time discuss with the 2nd defendant and 3rd defendant on the guarantee.

(viii) as the court held that the guarantee did not continue to bind during the second tenancy period, thus there is no question of the guarantee continuing to bind during the monthly tenancy commencing from 1 August 2007. The guarantee had terminated upon the expiry of the first tenancy period and there can be no renewal of the guarantee upon the commencement of the monthly tenancy.

(ix) as there was no guarantee subsisting as at 31 July 2007, the 2nd and 3rd defendants cannot be held liable as guarantors in the claim for mesne profits against the 1st defendant.

(x) the court is in agreement with counsel for the defendants that the court should not rewrite the contract for the parties (see *Emar Sdn Bhd (under Receivership) v. Aidigi Sdn Bhd and another appeal* [1992] 1 LNS 33). If the plaintiff had intended to have the guarantee continue for as long as the 1st defendant was the tenant, regardless of whether it was for a fixed term or on a monthly basis, the plaintiff ought to have made it expressly known to the 2nd and 3rd defendants and to obtain their consent thereto;

(xi) the tenancy agreement and guarantee were drafted and prepared by PW4, solicitor for the plaintiff. If there is any ambiguity or uncertainty the doubt should be resolved against the plaintiff under the *contra proferentum* rule. In chapter 6 of the textbook "The Interpretation of Contracts" by Kim Lewison cited by counsel for the defendants, the author reiterates the general principle of law that "where there is any doubt as to the construction of any stipulation in a contract, one ought to construe it strictly against the party in whose favour it has been made." In this case in the absence of an express provision in the guarantee that the guarantee shall continue for as long as the tenancy continues, it must necessarily be construed against the plaintiff that there was no such intention on the part of the plaintiff and the 2nd and 3rd defendants;

(xii) in the case of *Union Workshop (Construction) Co v. Ng Chew Ho Construction Co Sdn Bhd* [1977] 1 LNS 149 the Federal Court held that "... as the meaning of the sub-contract was perfectly clear there could be no resort to other documents to give another meaning to it. Where the draftsmen had purposely left out any condition which he could without difficulty have put in, then the *contra proferentum* rule applied so that the inevitable conclusion was that the clause ... did not form part of the agreement between the parties ..."

While the plaintiff cannot resort to rely on other documents to give another meaning to the Tenancy Agreement and the guarantee, the plaintiff too cannot resort to introducing parol evidence to prove that the guarantee shall be binding so long as the tenancy continued. Sections 91 and 92 of the Evidence Act 1950 clearly prohibit the plaintiff from doing so.

[23] In the result, the plaintiff's claim against the 2nd and 3rd defendants for mesne profits owing by the 1st defendant by virtue of the guarantee was dismissed with costs to be taxed.